No. 09-1548

JUL 20 2010

In The
Supreme Court of the United States

KING C. LUM,

Petitioner,

v.

KAUAI COUNTY COUNCIL; BRYAN BAPTISTE, individually, and in his capacity as the Mayor of Kauai County, State of Hawaii; LEON GONSALVES, SR., individually, and in his capacity as a Commissioner, Kauai Police Commission; MICHAEL H. TRESLER, individually, and in his capacity as the Director of Finance, Kauai County; KAUAI COUNTY; and JOHN DOES 1 to 20 and JANE DOES 1 to 20,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION OF RESPONDENT LEON GONSALVES, SR.

DIANE W. WONG
1003 Bishop Street, Suite 2500
Honolulu, Hawaii 96813
Telephone: 808-537-6119
E-Mail:
diane.wong@hawadvocate.com

Attorney for Respondent Leon Gonsalves, Sr.

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether the Ninth Circuit Court of Appeals correctly affirmed summary judgment in favor of Respondent Leon Gonsalves, Sr.

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COUNTERSTATEMENT OF THE CASE

A. STATEMENT OF FACTS

Respondent Leon Gonsalves, Sr. (hereinafter "Gonsalves") was a Police Commissioner for Kauai County since his appointment by Mayor Baptiste in March 2004. In approximately April of 2004, acting police chief Wilfred Ihu left. Petitioner King C. Lum (hereinafter "Petitioner") and other candidates applied for the position of police chief. At a Commission meeting in April 2004, Gonsalves voiced his concerns about Petitioner's leadership ability and stated that the interim chief should not be chosen from candidates for permanent chief.

Only Petitioner was called and asked to be interim chief. Gonsalves and another commissioner voted against Petitioner as interim police chief. Petitioner was appointed as interim chief of police in May, 2004.

During the selection process for a new chief of police, Gonsalves tried to inform the Commission about Petitioner's involvement in the so-called "FantaSee Express Affair" and submitted the sworn testimony of Officer Darla Abbatiello.

Gonsalves voted against Petitioner but was outvoted by a margin of 4-1. On September 29, 2004, Petitioner was appointed as chief of police.

On September 30, 2004, Gonsalves sent a memo to the Kauai Board of Ethics, expressing his strong concerns regarding the selection process.

On October 14, 2004, Gonsalves sent an e-mail that referred to Petitioner.

On November 1, 2004, Gonsalves met with Petitioner in the Mayor's office and apologized to Petitioner. Petitioner claims that he accepted the apology and put the entire matter behind him.

Shortly thereafter, Petitioner initiated the process of filing a complaint with the Hawaii Civil Rights Commission (hereinafter "HCRC") against Gonsalves. Petitioner filed a complaint with the HCRC on April 7, 2005.

On February 18, 2005, Gonsalves wrote a memo to Chairman Michael Ching regarding his continuing concerns about the Petitioner's performance as chief of police, including the civilian take-home car program.

On September 23, 2005, Gonsalves wrote a memo to the Commission expressing his concerns regarding Petitioner's performance as chief of police, including a huge budget overrun and what Gonsalves believed was an alarming rate at which officers were leaving the Department. On September 26, 2005, Gonsalves wrote a memo in which he sought sanctions for Petitioner's handling of the budget and other matters.

On February 23, 2006, Judge McConnell issued a decision in the Board of Ethics inquiry, finding that there were improprieties in the selection process and that Commissioner Ching improperly campaigned for Petitioner and violated the County's Code of Ethics.

After evaluating Judge McConnell's decision, Kauai County determined that the process by which Petitioner was chosen was flawed and notified Petitioner on or about May 30, 2006. Petitioner resigned from his position of chief of police, rather than return to his original position as a Lieutenant in KPD.

Gonsalves had no part in Kauai County's decision to remove Petitioner or Petitioner's decision to resign.

B. STATEMENT OF THE CASE

On May 8, 2007, Petitioner filed a Fourth Amended Complaint for Declaratory and Injunctive Relief and Damages against Gonsalves, Respondents Kauai County Council, Bryan Baptiste, individually and in his capacity as the Mayor of Kauai, Michael Tresler, and Kauai County, and various Doe Defendants. Petitioner alleges five claims for relief: discrimination and reprisal in violation of 42 U.S.C. § 2000e-2, et seq. and Hawaii Revised Statutes (HRS) § 378-2 (first claim); violation of 42 U.S.C. § 1981 (second claim); civil conspiracy (third claim); due process, public policy and breach of contract (fourth claim); and violation of Hawaii Whistleblowers' Protection Act (fifth claim). The fourth claim for relief does not allege claims against Gonsalves.

On May 18, 2007, the district court issued an "Order Granting Defendants' Motion for Partial Summary Judgment" with respect to the motion filed by

Respondents Kauai County Council, Bryan Baptiste, and Michael Tresler.

On November 9, 2007, the district court issued an Amended Order granting Gonsalves' Motion for Summary Judgment.

On December 1, 2009, the Ninth Circuit Court of Appeals affirmed judgment in favor of Gonsalves and the other Respondents. Petitioner mischaracterizes the reasons for the Ninth Circuit's ruling in favor of Gonsalves. Contrary to Petitioner's contentions, Petitioner's claims of race discrimination, retaliation for filing a race discrimination complaint and whistleblowing activities were not dismissed "on the basis that [Petitioner] did not have a property interest in his continued employment as the Kauai police chief." (Petition at 16).

The Ninth Circuit agreed with the district court that Petitioner "raised no issue of material fact in his several claims against [Gonsalves]." The Ninth Circuit gave specific reasons for upholding the dismissal of each claim against Gonsalves. (*See* Ninth Circuit opinion, Petition Appendix at 4a-6a).

First, the Ninth Circuit agreed that there is no individual liability under Title VII, 42 U.S.C. § 2000e-2. Second, the Ninth Circuit agreed that there is no individual liability under Hawaii Revised Statutes § 378-2(1)(A) and (2). The Ninth Circuit also held that Petitioner failed to provide any evidence in support of his § 378-2(3) claim that Gonsalves aided and abetted discriminatory action.

Third, the Ninth Circuit affirmed summary judgment on Petitioner's § 1981 claims on the ground that Petitioner's evidence showed no more than "isolated incidents" that did not support a hostile work environment claim. The Ninth Circuit also ruled that Petitioner did not have a viable retaliation claim because he did not show that Gonsalves took any adverse employment action.

Fourth, the Ninth Circuit affirmed summary judgment on Petitioner's § 1985 claim against Gonsalves. The Ninth Circuit said that even assuming that Petitioner could show that Gonsalves was racially motivated, Petitioner offered no evidence of a conspiracy between Gonsalves and anyone else to deprive Petitioner of equal protection.

Fifth, the Ninth Circuit noted that the district court ruled that there is no individual liability under the Hawaii Whistleblowers' Protection Act, Haw. Rev. Stat. § 378-62. Citing § 378-61, the Ninth Circuit said that even if there is individual liability, it can attach at most to an agent of the employer. The Ninth Circuit held that Petitioner failed to provide evidence that Gonsalves should be considered an agent of Petitioner's employer, Kauai County, much less that Gonsalves's retaliatory actions were taken in his capacity as an agent.

REASONS WHY THE PETITION SHOULD BE DENIED

Petitioner has explicitly excluded his claims against Gonsalves from the scope of the Petition. Petitioner states that his claims of race discrimination, retaliation for filing a race discrimination complaint and whistleblowing activities and allegations "are not part of this appeal." (Petition at 16).

None of the "questions presented" in the Petition pertain to Petitioner's claims against Gonsalves. None of the arguments under Petitioner's "Reasons for Granting the Petition" pertain to Petitioner's claims against Gonsalves. Petitioner's "questions presented" and arguments all relate to termination of employment. Petitioner does not dispute that Gonsalves had no part in Kauai County's decision to remove Petitioner or Petitioner's decision to resign. Petitioner does not challenge the Ninth Circuit's ruling that Petitioner failed to provide evidence that Gonsalves was an agent of Petitioner's employer, Kauai County.

Petitioner fails to demonstrate compelling reasons that would warrant a grant of certiorari. Instead of addressing the criteria for a grant of certiorari pursuant to Rule 10 of the Rules of the Supreme Court of the United States, Petitioner merely attempts to reargue the merits of his appeal to the Ninth Circuit and the merits of his opposition to the other Respondents' motions for summary judgment.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

DIANE W. WONG
1003 Bishop Street, Suite 2500
Honolulu, Hawaii 96813
Telephone: 808-537-6119
E-Mail: diane.wong@hawadvocate.com

Attorney for Respondent
Leon Gonsalves, Sr.

Dated July 2010